RECENT CASES

HOMICIDE—TRIAL—INSTRUCTIONS—EVERSOLE V. COMMONWEALTH, 163 S. W., 496.—In the prosecution of a wife for the killing of her husband, it was *held*, that it was error to refuse an instruction that if the husband ordered her to leave the house, and threatened to kill her if she didn't, and on her refusal assaulted her—the wife had a right to use all necessary force to resist, even to the point of killing the husband.

To justify a killing on the ground of self-defense the defendant must have had ground to believe himself in great peril, that the killing was necessary for escape, and there were no other safe means of retreat. *People v. Mallon,* 116 N. Y. App., 425. But in some of the southern states the doctrine prevails that a man need not retreat if he is where he has a right to be, even though the retreat could be safely made. *Brinkley v. State,* 89 Ala., 34. But to the general rule as to the necessity of retreat there is an universal exception that one attacked in his own house, and who is in the right, need not retreat but may resist even to the point of killing his assailant. *State v. Bissonnette,* 83 Ct., 261; *Andrews v. State,* 159 Ala., 115; *Jones v. State,* 76 Ala., 8. But the defendant must himself have been without fault. *State v. Touri* 101 Minn., 370. The theory is that when a man is in his own house he is deemed to have retreated to the wall and need not retreat further. *Palmer v. State,* 9 Wyo., 40. A man being in his own house need not fly as far as he can, as in other cases of *se defendendo,* for he hath the protection of his house to excuse him from flying. 1 Hale, P. C., 486. In the case of the husband and wife, the husband's home is the wife's home and she needn't retreat therefrom to avoid a difficulty even with her husband. *Hutchison v. State,* 165 Ala., 16. A person in his own house has the same right to stand his ground and kill in self defense when assaulted by a partner or co-tenant. *Jones v. State,* 76 Ala., 8. The principal case is in accord with the great weight of authority in making, under these circumstances, an exception to the rule that there is a duty to retreat.

INFANTS—CONTRACT TO PURCHASE LAND—RESCISSION.—HEALY V. KELLOG, 145 N. Y. S., 943.—An infant entered into a contract to purchase land on installments. After reaching his majority the infant, not wishing to perform, offered to return the contract, and demanded back the money already paid. The defendant refused to release the infant and threatened to send her to jail if she failed to perform. The infant thereupon made several payments when, learning of her rights, refused to carry out the contract. *Held,* notice of her disaffirmance together with her offer to return the contract amounted to a disaffirmance, though in ignorance of her rights, and under duress, she made several payments after reaching her majority, believing she was still bound by her contract.

In contracts relating to realty, the earlier cases held that the act of rescission on the part of an infant must be one of the same solemnity and

dignity as the original act. A deed of bargain and sale of waste or uncultivated land by an infant was avoided by a subsequent deed of bargain and sale of the same land to a third party after majority. *Jackson v. Carpenter,* 11 Johns., 541; *Jackson v. Burchin,* 14 Johns., 124. But if the land was in a state of cultivation and the infant was out of possession, the infant must enter in addition to executing a deed. *Roberts v. Wiggins,* 1 N. H., 73; *Harris v. Cannon,* 6 Ga., 382. The foregoing views do not generally prevail in modern law. "The disaffirming act need take no particular form or expression, but it must show an unequivocal intent to repudiate." *Singer Mfg. Co. v. Lamb,* 81 Mo., 225; *Heath v. West,* 26 N. H., 199. Contracts relating to persons or personalty may be disaffirmed by any act which shows an intention not to be bound by them. *Skinner v. Maxwell,* 66 N. C., 47. There has been no generally accepted principle laid down by the courts governing the rescission of contracts by infants. The tendency has been, and it now appears to be the prevailing rule, to look at the intent of the infant and to give effect to it. This decision is clearly sound and is in harmony with the general tendency of the courts.

MASTER AND SERVANT—VOLUNTARY ASSOCIATION—LIABILITY.—WAHLHEIMER *v.* HARDENBERGH, APP. DIV., N. Y., JAN., 1914. CLARK AND SCOTT, JJ., *dissenting.*—Several newspapers formed a voluntary news association to collect and distribute news. The association was duly organized with the customary officers and an executive committee. Defendant was employed as general manager with authority to employ help to carry out the purposes of the association under the direction of the executive committee. One of the defendant's subordinates in the course of his employment wrote and published matter libelous *per se* of the plaintiff. Defendant knew nothing of the affair till two years later, when suit was brought to recover damages for the libel. *Held,* defendant was liable on the theory of *respondeat superior.*

At common law voluntary associations were regarded as partnerships in the transaction of business. *Williams v. Bank of Michigan,* 7 Wend., 542; *Ferris v. Thaw,* 5 Mo. App., 279. No action could be maintained against an unincorporated association as such; *Karges Furniture Co. v. Local Union No.* 131 *et al.,* 165 Ind., 414; but could against the members composing the association; *Bullock v. Dunning,* 54 Ind., 115; and each member who participates in tortious acts of the association will be liable. *Comm. v. Hunt,* 4 Met. 111; *Carew v. Rutherford,* 106 Mass., 1. A master is liable for injuries to third persons caused by the act of his servant acting within the scope of his employment. *Toledo, W. & W. R. Co. v. Harmon,* 47 Ill., 298; *Gray v. Portland Bank,* 3 Mass., 363. A servant who is sued by such third party may have an action over against his master. *Gower v. Emery,* 18 Me., 79, *Lowell v. Boston & Lowell R. R.,* 23 Pickering, 24; *Willard v. Newbury,* 22 Vt. 458. The majority opinion proceeds on the theory that the defendant is the master and his subordinates his servants. The dissenting opinion takes the position that the association is the responsible head, and the subordinates as well as the defendant are

its employes. This position is without doubt sound. The error into which the majority of the court have fallen is in failing to recognize and treat the association as a partnership composed of the several newspaper corporations. If we grant the court's assumption, one that is probably incorrect in fact, that the association was merely a name with no actual persons or corporations as members, its conclusion that the defendant was the actual employer is no doubt accurate.

MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE OF SERVANT'S ASSISTANT.—DILLON V. MUNDET ET AL., 145 N. Y. S., 975.—A servant being engaged in the business and on behalf of his master and acting within the scope of his employment, the master is liable for negligence of one assisting the servant therein, at the servant's request, resulting in injury to a third person.

Haluptzok v. Great Northern Ry. 55 Minn., 446, decided that where a servant procures another to assist him, the master is liable only if the servant had express or implied authority; likewise 26 *Cyc.*, 1521. Where defendant's servant, driving former's horse, gave the reins to another, defendant was held liable for a resultant injury. *Booth v. Mister,* 7 Carr. & P., 66; *Mangan v. Foley,* 33 Mo. App., 250, held there was no liability when defendant's teamster engaged a third person to drive temporarily. *Jewell v. Grand Trunk Railroad,* 55 N. H., 84; *Thorp v. Minor,* 109 N. C., 152; *Appel v. Eaton & Co.,* 97 Mo. App., 428; accord. In these cases absence of authority to employ assistants was decisive. *Simms v. Monier,* 29 Barb., 419, held the master is liable only if the servant directed the act. This was the fact in the principal case, which might better be put on the ground of the negligence of the servant himself, since, at the time of the collision, he was in the automobile, and the negligence of the driver was substantially his.

Many cases, however, lay down the rule as broadly as in *Dillon v. Mundet; Dimmitt v. Hannibal Railroad,* 40 Mo. App., 654; *Lakin v. Oregon-Pacific Railroad,* 15 Ore., 220; *Pittsburgh v. Detroit Transportation Company,* 122 Mich., 445. On the facts the decision doubtless harmonizes with the great majority of cases, for, though no authority was shown, the servant so directed the act that it was his in fact.

MUNICIPAL CORPORATIONS—TORTS—REIDER V. CITY OF MT. VERNON, 145 N. Y. S., 697.—Under an ordinance forbiding the use of fireworks in the streets or elsewhere in the city within the fire limits, except by permission of the mayor, it was *held,* that the mayor had no authority to permit the use of fireworks in the city other than in the streets or within the fire limits and when he did so, and the plaintiff was injured as a result, the defendant city is not liable.

It is now well settled that a municipality may render itself liable for a tortious act. *Butlrick v. City of Lowell,* 1 Allen, 172. But the city can act only through authorized officers and it cannot be held liable unless these

officers had authority under the premises. *Rutherford v. City of Williamson,* 70 W. Va., 402. So a city can only be liable for torts arising out of changing the grade of a street where the change was not authorized by ordinance. *Gardner v. City of St. Joseph,* 96 Mo. App., 657. But subsequent ratification by a proper body would make the city city liable. *Rutherford v. City, supra.* The law is best summed up as follows: the corporation is not liable for the unauthorized acts of its officers though done *colore officii;* it must further appear that they were expressly authorized to so the acts, or that they were done *bona fide* in pursuance of a general authority to act for the city on the subject to which they relate. *Thayer et al. v. City of Boston,* 19 Pick., 511. And whether a power has been delegated is a question for the jury. *Thayer et al. v. City of Boston, supra.* In the principal case the limitations on the mayor's authority were clearly indicated and the holding is in accord with all the authorities.

NEGLIGENCE—INJURIES TO CHILD OF SERVANT—IMPUTED NEGLIGENCE. —CLOVER CREAMERY CO. v. DIEHL, 63 So. (ALA.), 196.—Defendant maintained on its premises certain machinery which it negligently permitted to be left open and unguarded, although it knew the plaintiff lived upon the premises and was continually playing around the machinery. Plaintiff's father was the manager in charge of defendant's plant. The plaintiff, a three-year-old child, was injured by the machinery while being operated by the defendant's manager. *Held,* the contributory negligence of the father was not available as a defense to an action against the company for injuries to the child.

The doctrine of imputed negligence in this class of cases arose in the leading case of *Hartfield v. Roper,* 21 Wend., 615, which held that a child of such tender years as not to possess sufficient discretion to avoid danger who was permitted to be in a public highway without any one to guard him and is injured by a traveller cannot recover, because of the negligence of his parent, unless the injury was wilful. This doctrine prevails in a few jurisdictions. *Casey v. Smith,* 152 Mass., 294; *Leslie v. Lewiston,* 62 Me., 468; *Hathway v. T. W. & W. R. Co.,* 46 Ind., 25. The contrary doctrine, the one prevailing in the majority of states, was laid down in the leading case of *Robinson v. Stone,* 22 Vt., 213. Other states in accord are *Daley v. N. & W. R. Co.,* 26 Conn., 598; *Bisaillau v. Blood,* 64 N. H., 565. See 21 L. R. A, 77, note, for authorities *pro* and *con.* Some courts hold that the parent's contributory negligence bars a recovery by the child when the parent is present and the child is in his custody. *Ohio & M. R. Co. v. Stratton,* 78 Ill., 88. There is a good deal of authority *contra. Wymore v. Makasha County,* 6 L. R. A. (Iowa), 545, and note. By the great weight of authority the negligence of a parent cannot be imputed to the child. *Cleveland Roll. Mill Co. v. Corrigan,* 46 Ohio St., 283; *Chicago City R. Co. v. Wilcox,* 8 L. R. A. (Ill.), 494. The sounder view is doubtless the one laid down in the principal case, the theory being that the public owes duties to the child as well as to the parent, one of which is to prevent injuries to the child, and when a member of the public has failed in his duty he should be held responsible to the child, regardless of the negligence of the parent in discharging his duty.